

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOSE DIAZ & FRANCES DIAZ,)	
)	
Petitioners,)	
)	
v.)	Docket No. 22620-13 L.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER AND DECISION

The petition in this case was filed in response to a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (Notice of Determination), in which respondent's Appeals Office determined not to sustain a proposed levy on petitioners' assets to collect Federal income tax liabilities for 1992, 1993, 1994, 1995, and 1996. On August 25, 2014, respondent filed a Motion for Summary Judgment (Motion) together with an Affidavit of Shawna Early in Support of Motion for Summary Judgment (Early Affidavit).¹ On August 27, 2014, petitioners filed a Response to Motion for Summary Judgment (Response).

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988). Summary judgment may be granted where there is no genuine issue of material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b).² The moving party bears the burden of proving that there is no genuine issue of material

¹Ms. Early is an attorney employed by respondent and was in possession of respondent's legal and administrative files regarding petitioners' case as of the time the Motion and Early Affidavit were filed.

²Unless otherwise indicated, all Rule references are to the Tax Court Rules of Practice and Procedure and all section references are to the Internal Revenue Code of 1986, as amended.

fact, and factual inferences are viewed in a light most favorable to the nonmoving party. Rule 121(d); Craig v. Commissioner, 85 T.C. 812, 821 (1985); Jacklin v. Commissioner, 79 T.C. 340, 344 (1982). The party opposing summary judgment must set forth specific facts which show that a genuine issue of material fact exists and may not rely on mere allegations or denials in their pleadings. Rule 121(d); Grant Creek Water Works, Ltd. v. Commissioner, 91 T.C. 322, 325 (1988); Casanova Co. v. Commissioner, 87 T.C. 214, 216-217 (1986). “Conclusory allegations unsupported by factual data will not create a triable issue of fact.” Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978) (construing Federal Rule of Civil Procedure 56(e), from which Rule 121(d) is derived); See also Hansen v. United States, 7 F.3d 137, 139 (9th Cir. 1993); Rauenhorst v. Commissioner, 119 T.C. 157, 175 (2002) (“Summary assertions and conclusory allegations are simply not enough evidence to raise a genuine issue of material fact.”).

Background

The parties do not dispute the following background information. On August 19, 2013, respondent issued a Notice of Determination with respect to a proposed levy to collect petitioners’ Federal income tax liabilities for 1992 through 1996. In the Notice of Determination, respondent’s Appeals Office determined not to sustain the levy. Petitioners timely petitioned this Court for review of the Notice of Determination pursuant to section 6330(d).

* * *

Discussion

In his Motion, respondent reiterates the concession made in the Notice of Determination that respondent will not proceed with the levy at issue in this case because respondent cannot establish that the period of limitations on collections remains open for the unpaid taxes that were the subject of the proposed levy. Nonetheless, respondent contends in his Motion that he is entitled to summary judgment in his favor with respect to two issues that petitioners contend support a decision in their favor; namely (i) that the assessments of the liabilities at issue in this case were timely and otherwise valid, and (ii) that this Court lacks jurisdiction to order the refunds that petitioners seek. Respondent seeks the foregoing summary adjudication to resolve petitioners’ contention that we have jurisdiction,

pursuant to section 6213(a), to order a refund of payments petitioners made in connection with their 1992 tax liability.³

Section 6213(a) provides in pertinent part:

no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice [of deficiency] has been mailed to the taxpayer * * * [T]he making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection.

Petitioners argue that because respondent failed to issue notices of deficiency before assessing petitioners' 1992 through 1996 tax liabilities, respondent collected payments with respect to petitioners' 1992 tax liability in violation of section 6213(a). Therefore, petitioners claim, we have jurisdiction under section 6213(a) to order a refund of any amounts collected for 1992.⁴

We note first that it necessarily follows from petitioners' argument that they are contending that the assessments of the 1992 through 1996 tax liabilities were

³In the Response, petitioners actually refer to their taxes "collected * * * for 2002". See, e.g., Response at p. 2. Although petitioners make repeated reference to 2002, these references are an obvious error, as no 2002 liability is at issue in this case. In context, it is clear that petitioners intended to refer to their 1992 liability, as they cite their account transcript for 1992, attached to the Early Affidavit, and payments recorded therein as the amounts collected that petitioners contend should be refunded. See Response at pp. 2-3.

⁴Petitioners' argument makes specific reference only to 1992. It is unclear whether they intend the same principles to apply to the liabilities for the other years at issue, entitling them to refunds for those years as well. Regardless, our holding herein regarding our lack of jurisdiction to order any refunds would apply equally to the other years.

invalid, a contention which implicates section 6330(c)(1)'s requirement that the Appeals officer conducting a hearing pursuant to section 6330 shall obtain verification that "the requirements of any applicable law or administrative procedure have been met." This verification requirement is subject to judicial review in a case brought pursuant to section 6330(d)(1) without regard to whether the taxpayer raised it during the section 6330 hearing. Hoyle v. Commissioner, 131 T.C. 197, 202-203 (2008).

Respondent alleges in his Motion that he assessed petitioners' Federal income tax liabilities for 1992 through 1996 on two bases. First, respondent alleges that petitioners reported taxes as due on each of the returns they filed for 1992 through 1996 and that respondent accordingly assessed those reported amounts within 3 years after each return was filed, in accordance with section 6501(a). Second, respondent contends that he assessed additional taxes after examination for 1992 through 1994 on the basis of Forms 4549, Income Tax Examination Changes, that petitioners signed.

Respondent supports these contentions with a copy of petitioners' account transcripts for 1992 through 1996 and copies of Forms 4549 for 1992 through 1994, attached to the Early Affidavit. The account transcripts record that petitioners filed income tax returns for 1992, 1993, 1994, 1995, and 1996 on April 19, 1995, April 19, 1995, April 15, 1995, October 15, 1997, and October 15, 1997, respectively, and that petitioners reported income taxes as due on those returns in the amounts of \$3,639, \$3,317, \$2,944, \$33,938, and \$34,477,⁵ respectively. The account transcripts also record that respondent assessed the self-reported taxes reflected on petitioners' 1992, 1993, 1994, 1995, and 1996 returns on May 29, 1995, May 29, 1995, June 5, 1995, November 24, 1997, and November 24, 1997, respectively. Additionally, the account transcripts record that respondent assessed additional taxes as a result of examinations for 1992 and 1993 on July 7, 1997, and for 1994 on June 9, 1997. Attached to the Early Affidavit are Forms 4549 signed by petitioners in which they consent to the assessment of additional taxes for 1992

⁵Petitioners reported taxes due of \$34,477 on their 1996 return. The 1996 account transcript records that on November 24, 1997, respondent assessed a liability of \$35,267.44. However, the account transcript further records that on February 9, 1998, respondent abated the amount in excess of that which petitioners reported, \$790.44, with the result that the assessment of income tax that respondent sought to collect matched the amount of tax petitioners reported as due on their return.

through 1994 in amounts that correspond to the additional assessments respondent made for those years, as reflected in the account transcripts.

Absent a showing of irregularity, a Form 4340 or a computer printout of a taxpayer's transcript of account provide presumptive proof of a valid assessment. See Hefti v. IRS, 8 F.3d 1169, 1172 (7th Cir. 1993); Geiselman v. United States, 961 F.2d 1, 5-6 (1st Cir. 1992); Rocovich v. United States, 933 F.2d 991, 994 (Fed. Cir. 1991); United States v. Chila, 871 F.2d 1015, 1017-1018 (11th Cir. 1989); United States v. Lorson Elec. Co., 480 F.2d 554, 555 (2nd Cir. 1973). See also McLaine v. Commissioner, 138 T.C. 228, 241 (2012). In the Response, petitioners have not disputed any of the foregoing matters reflected in, nor identified any irregularity in, the account transcripts. They have not disputed the authenticity of the income tax returns or the Forms 4549 they signed that are attached to the Early Affidavit. Consequently, we conclude that respondent has shown for purposes of summary judgment that the assessments of the liabilities at issue were all made pursuant to either petitioners having reported the amounts as due on their returns or petitioners having consented to the immediate assessment (and collection) of the amounts on Forms 4549. Moreover, the return filing dates and assessment dates recorded in the account transcripts--none of which petitioners have disputed--demonstrate that each of the assessments for the years at issue was made within 3 years of the filing date of the return for that year. Thus, respondent has established for purposes of summary adjudication that all of the 1992 through 1996 assessments were made within the period of limitations on assessment provided by section 6501(a).

Given the foregoing findings, petitioners' contention that respondent's 1992 through 1996 assessments were invalid because respondent failed to issue them notices of deficiency is meritless. While the Secretary must generally issue a notice of deficiency before assessing an income tax that is greater than that shown as due by the taxpayer on his return, see secs. 6212(a) and 6213(a), no such notice is necessary for the assessment of amounts reported as due on the return, sec. 6201(a). Similarly, no deficiency notice is required for income taxes covered by Forms 4549, which authorize the Commissioner to assess and collect the taxes

reflected thereon.⁶ Petitioners' execution of the Forms 4549 covering the additional assessments for 1992 through 1994 waived the deficiency notice requirement. See Perez v. United States, 312 F.3d 191, n. 23 (5th Cir. 2007) (citing Aguirre v. Commissioner, 117 T.C. 324 (2001), and In re Barry 48 B.R. 600 (Bankr. M.D. Tenn. 1985)). Respondent is therefore entitled to a decision as a matter of law, and we so hold, that the assessments at issue in this case were timely and validly made. Petitioners having suggested no other infirmity in the assessment process or other failure by the Appeals officer to verify that the requirements of any applicable law or administrative procedure were satisfied, respondent is likewise entitled to a decision as a matter of law, and we so hold, that the Appeals officer satisfied the verification requirement of section 6330(c)(1).

Because no notices of deficiency were required to effect the assessments at issue, the account transcripts--not surprisingly--do not reflect any having been issued. Petitioners have not pointed to any such notices or suggested they were issued. The same is true with respect to any timely petition for redetermination of a deficiency pursuant to section 6213(a).⁷ In the absence of a notice of deficiency and a timely filed petition for redetermination of a deficiency, the Court has no

⁶The copies of the Forms 4549 state:

Consent to Assessment and Collection - I do not wish to exercise my appeal rights with the Internal Revenue Service or to contest in United States Tax Court the findings in this report. Therefore, I give my consent to the immediate assessment and collection of any increase in tax and penalties, and accept any decrease in tax and penalties shown above, plus any additional interest as provided by law.

Early Affidavit, Exhibits D, E, and F.

⁷The Petition in this case was a petition invoking the Court's jurisdiction under section 6330(d), not a petition for redetermination of a deficiency pursuant to section 6312(a), as is obvious from--among other things--petitioners having entitled it a "Petition For Lien or Levy Action Under Code Section 6330(d)" and attached to it a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330.

jurisdiction under section 6213(a) to order any refunds in this case, as the statute itself makes abundantly clear. Section 6213(a) states:

The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

Petitioners' contention that the Court has jurisdiction in this case pursuant to section 6213(a) is therefore meritless, and respondent is entitled to a decision in his favor as a matter of law that this Court lacks jurisdiction to order any refunds in this case.

To reflect the foregoing, it is

ORDERED that respondent's Motion for Summary Judgment, filed August 25, 2014, is granted in that we hold that (i) the assessments of petitioners' Federal income tax liabilities for 1992 through 1996 were timely and valid; (ii) the Appeals officer satisfied the requirements of section 6330(c)(1); and (iii) the Court lacks jurisdiction (under section 6213(a) or otherwise) to order refunds of any portion of the foregoing assessments that have been collected. It is further

ORDERED and DECIDED that the Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330, dated August 19, 2013, for petitioners' taxable years 1992, 1993, 1994, 1995, and 1996 upon which this case is based, is sustained.

(Signed) Joseph H. Gale
Judge

ENTERED: **AUG 21 2015**